No. 91-7604

In The

Supreme Court of the United States

October Term, 1992

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. AND SHANNA RUGGENBERG,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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Absolute immunity is the exception, not the rule, and should be granted only where necessary to preserve independent and impartial judgment. Neither historical precedent nor public policy supports a departure from this principle in the case of court reporters.

Respondents offer no persuasive reason why qualified immunity cannot adequately protect court reporters from vexatious suits just as it protects thousands of government officials and employees, from Cabinet members to governors and police officers. Nor do Respondents explain why court reporters, in comparison with Cabinet members and the like, have some unique susceptibility to vexatious litigation that warrants extending absolute immunity to cover transcript production. For these reasons, and because the purpose of absolute immunity is not served by according such protection to court reporters, the decision of the Ninth Circuit Court of Appeals should be reversed.[1]

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[1] Respondent Byers & Anderson's contention that Petitioner's Statement of Facts contains allegations not properly before this Court ignores that the recitations were taken from the decision of the Ninth Circuit Court of Appeals that is before this Court for review. *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1472 (9th Cir. 1991) (JA 51-54). Moreover, the posture of this case does not require the Court to make any judgment as to whether Petitioner's alleged facts are true; the Court is asked to decide only whether the defense of absolute immunity should preclude Petitioner from recovery *if* the alleged facts are true.

I. ABSOLUTE IMMUNITY DERIVES FROM FUNCTION, NOT FROM CONNECTION WITH "THE JUDICIAL PROCESS"

Respondents argue that absolute immunity is appropriate for court reporters because they perform "a function integrally related to the adjudicatory process." *See* Byers & Anderson Brief at 4.[2] Respondents reason that the purpose of absolute judicial immunity is to further the "efficient adjudication of claims," and therefore any function contributing to such adjudication must be insulated from all threat of liability. Hence, according to Respondents, this Court's functional approach resolves the absolute judicial immunity question by asking simply: (1) whether the court reporter's duties "are integrally related to the judicial process" and (2) whether public policy and the need for an "efficient" judicial system favor absolute immunity. Under Respondents' analysis, whether a court reporter's duties require adjudicatory or discretionary acts is irrelevant. Byers & Anderson Brief at 3-4.

Respondents' construction of the absolute immunity doctrine is incorrect for at least three reasons. First, neither the early common law nor this Court has ever recognized a blanket of absolute immunity covering all persons involved in the judicial process. For generations, literally hundreds of thousands of people have been integral participants in our nation's court system without the

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[2] The Brief of Respondent Byers & Anderson, Inc. is referred to as "Byers & Anderson Brief."

benefit of absolute immunity, and their exposure to liability has not obstructed the judicial process. Plaintiffs and defendants in civil suits have always been open to malicious prosecution and abuse of process claims; attorneys – including court-appointed public defenders – have long been subject to malpractice claims.[3] Even private law firms hired by state and federal agencies to conduct government litigation have done so for decades without any promise of absolute immunity. Respondents' "related to the judicial process" test inverts the presumption governing immunity: liability or qualified immunity is the rule; absolute immunity, the exception.

Second, "efficiency" has never been the primary purpose behind grants of absolute immunity; the overriding purpose is to insulate government officials and others from threats of liability that could deflect them from the proper execution of their official obligations. *Westfall v. Erwin*, 484 U.S. 292, 295 (1988).

> Judicial immunity arose because it was in the public interest to have judges who were at

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[3] Although public defenders and other court-appointed counsel may not be subject to *Bivens* and § 1983 actions, *see Polk County v. Dodson*, 454 U.S. 312 (1981), they still are subject to liability for malpractice. *Id.* at 325. This Court has analyzed immunity under state tort law claims in the same manner that it has analyzed immunity for constitutional violations. *See Westfall v. Erwin*, 484 U.S. 292 (1988). Witness immunity, in fact, is immunity from state defamation suit. *See* section I.B.2, *infra*.

In the instant case, Petitioner raised not only a *Bivens* claim but also tort and contract claims. However, the petition before this Court involves only the dismissal of Mr. Antoine's constitutional claims; the state law claims were dismissed by the district court without prejudice, for jurisdictional reasons. (JA 30)

> liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption.

Dennis v. Sparks, 449 U.S. 24, 31 (1980). *See also Pierson v. Ray*, 386 U.S. 547, 554 (1967). In contrast, judges making employment decisions enjoy, at most, qualified immunity, despite the distraction and time demands that vexatious discrimination suits can pose and the resulting drain on judicial efficiency; the danger of judges being improperly influenced by the threat of such suits is not sufficiently great to warrant absolute immunity. *Forrester v. White*, 484 U.S. 219 (1988). Indeed, if judicial efficiency were of paramount importance, Congress would have provided the courts with a wholesale exemption from Section 1983 actions.[4]

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[4] While freeing officials from the time demands of litigation is one of the policy reasons that supports the grant of absolute immunity in certain situations, this concern has never been the basis for according immunity in the first instance. *See Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976).

For example, the Court has rejected the argument that absolute immunity is necessary to protect judges from testifying in third-party actions.

> Of course, testifying takes time and energy that otherwise might be devoted to judicial duties; and, if cases such as this survive initial challenges and go to trial, the judge's integrity and that of the judicial process may be at stake in such cases. But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability.

Dennis, 449 U.S. at 30-31.

Finally, the idea that absolute immunity is conferred upon anyone who participates integrally in the judicial process, regardless of function, misconstrues this Court's functional analysis. That analysis looks at the need for breathing room in exercising judgment, not the need for removing exposure to liability generally. *Dennis*, 449 U.S. at 31. Respondents fail to demonstrate how a court reporter's production of a transcript is analogous to, or on a par with, the exercise of judgment historically accorded absolute immunity. Respondents also fail to demonstrate why court reporters face a unique threat of frivolous litigation that might justify extending absolute immunity to transcript production – or why they face any threat greater than that faced daily by thousands of police officers, FBI agents, and others, who perform their jobs with benefit of only qualified immunity.

A. RESPONDENTS' "RELATED TO THE JUDICIAL PROCESS" ANALYSIS CONVERTS ABSOLUTE IMMUNITY FROM THE EXCEPTION INTO THE RULE

The notion that the judicial process is so sacrosanct that all participants must be absolutely immune from civil liability is contrary to this Court's underlying approach to absolute immunity questions.[5] Absolute

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[5] Respondents' sweeping approach to absolute immunity is at odds with precedent, which rejects "a fixed, invariable rule of immunity [and instead] has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe v. McMillan*, 412 U.S. 306, 320 (1973).

immunity has always been granted cautiously and sparingly. *Hafer v. Melo*, 112 S. Ct. 358, 363 (1991); *Forrester*, 484 U.S. at 224. The presumption is against absolute immunity, and "the burden is on the official claiming immunity to demonstrate his entitlement." *Dennis*, 449 U.S. at 29.[6]

Nowhere in the Court's teaching does immunity derive from "connection" to a process. Nowhere in the common law or this Court's decisions does immunity absolutely insulate auxiliary court personnel – be they clerks, bailiffs, court reporters, docketing clerks, courtroom marshals, or guards – simply because their participation is important to the efficient administration of justice. Even the police officer presenting a probable cause affidavit to the court is not absolutely immune. *Malley v. Briggs*, 475 U.S. 335 (1986).

B. FUNCTIONAL ANALYSIS SERVES THE PRIMARY PURPOSE OF ABSOLUTE IMMUNITY: TO INSULATE GOVERNMENT OFFICIALS FROM IMPROPER INFLUENCES, NOT TO FOSTER EFFICIENCY

1. The Purpose of Absolute Immunity Is to Protect the Fearless Performance of Duty

The primary purpose of absolute immunity is to protect government processes from improper influences.

[6] Even officials who are granted absolute immunity in one context must justify the need for it in another. Thus, although prosecutors are absolutely immune for their selection of evidence, they receive only qualified immunity in supervising police investigations. *Burns v. Reed*, 111 S. Ct. 1934, 1943-44 (1991).

Westfall, 484 U.S. at 295. Adjudication, for example, should be on the merits, without concern about possible retaliation by the losing party against the adjudicator. *Pierson*, 386 U.S. at 554. Absolute immunity has been deemed necessary to shield judges' independence and impartiality from such concerns. *Id.*; *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872).

> If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits.

Forrester, 484 U.S. at 226-27.[7]

The justification for absolute prosecutorial immunity is no different.

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring

[7] Respondents contend that a purpose of absolute judicial immunity is to prevent collateral attacks on judgments and thereby ensure the finality of judgments. However, Petitioner's civil action against Respondents will have no bearing upon his criminal conviction. Moreover, Respondents misconstrue the finality-of-judgments principle. That principle guards against the continued reevaluation of cases on the merits, which would occur if collateral courts entertained claims against judges based on their court decisions. Such claims in essence cause a retrial of the original decisions, by putting at issue the merits of those decisions. *See* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 886 n.38.

Further, the collateral-attack principle never has barred all collateral suits against participants in the judicial process. Police officers applying to the court for warrants, for example, are subject to civil suit despite the fact that such suits are collateral to criminal proceedings. *E.g.*, *Malley*, 475 U.S. at 343.

> and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences and terms of his own potential liability in a suit for damages.

Imbler v. Pachtman, 424 U.S. 409, 424-25 (1976).

However, absolute immunity is not accorded to any official simply because of some danger that the official might be swayed from impartial and independent performance of his or her duties; that danger must be " 'very great.' " *Forrester*, 484 U.S. at 230 (citation omitted). Hence, a function protected by absolute immunity must entail special and broad discretion and, in addition, expose the official to a "very great" threat of vexatious suits.

2. The "Judicial Function" Inquiry Focuses on the Type of Conduct, Not Its Relationship to "the Judicial Process"

Because the primary purpose of absolute immunity is to preserve the impartiality of government action, the Court has adopted a functional test for determining whether to grant absolute immunity for any given government act: where the act involves adjudication or analogous weighing and evaluating, then absolute immunity may be appropriate.

> The central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from . . . liability without regard to whether the alleged tortious conduct is discretionary in nature. *When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct.* It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government."

Westfall, 484 U.S. at 296-97 (quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1957)) (emphasis supplied).[8]

The judicial functions that are protected, hence, are those entailing either adjudication or decisionmaking akin to adjudication. It is for this reason that jurors[9] and prosecutors enjoy absolute immunity.

> It is the functional comparability of *their judgments* to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well.

Imbler, 424 U.S. at 423 n.20 (emphasis supplied).

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[8] While decisionmaking or discretion is not sufficient to warrant absolute immunity for a particular function, *see Forrester*, 484 U.S. at 230, it is necessary. *Westfall*, 484 U.S. at 297 ("Because it would not further effective governance, absolute immunity for non-discretionary functions finds no support in the traditional justification for official immunity."); *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982); *Ex Parte Virginia*, 100 U.S. 339 (1880). By asking the Court to allow absolute immunity for the nondiscretionary task of producing a completed transcript, Respondents are *sub silentio* asking the Court to overrule these cases.

[9] Absolute immunity for jurors, a centuries-old principle, reflects the need to preserve the jury's independence not only from parties but also from judges. *See Bushell's Case*, 124 Eng. Rep. 1006, 1010-11 (1670).

In addition to judges and jurors making adjudicative decisions and prosecutors making prosecutorial decisions, *see Malley*, 475 U.S. at 343, the only other participants in "the judicial process" who have been accorded absolute immunity by this Court are witnesses.[10] Contrary to Respondents' assertion, testifying is a highly discretionary act, easily susceptible to improper influences.

> A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. . . . A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.

Briscoe v. LaHue, 460 U.S. 325, 333 (1983) (citation omitted).

Amicus Curiae National Court Reporters Association's contention that transcript production is not a mere mechanical task but requires substantial decisionmaking

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[10] Witness immunity, like immunity for judges, has deep common law roots. *Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983). Its purpose was and is to protect against the threat of defamation suits by disgruntled, nonprevailing parties. *Id.* at 332-33. Witnesses require absolute immunity so the public may be confident they are testifying freely and truthfully, according to their consciences, without fear of retribution. *Id.* at 333-34.

and discretion, Brief of Amicus Curiae National Court Reporters Association ("Court Reporter Brief") at 13-14, misses the point. Some modicum of decisionmaking does not transform an act into a discretionary function; virtually every act entails some choice. *Westfall*, 484 U.S. at 298. Producing a transcript entails no significant weighing and evaluating; two reporters transcribing the same proceeding should produce substantially and substantively identical transcripts. The Association's examples of court reporter discretion – "translating the notes taken during trial into a comprehensive written record" and "insertion of the correct punctuation to reflect the meaning of the speaker," Court Reporter Brief at 14 – hardly reflect the broad range of discretion exercised by judges, prosecutors, jurors, and witnesses. *Cf. Butz v. Economou*, 438 U.S. 478, 513 (1978) (administrative hearing examiner entitled to absolute immunity because examiner "may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions"). Certainly governors and the Attorney General face far more complex decisions on a daily basis, again, with only qualified immunity.

II. POLICY CONSIDERATIONS FAVOR, AT BEST, QUALIFIED IMMUNITY FOR COURT REPORTERS

Respondents argue that policy reasons dictate the need to extend absolute immunity to court reporters and that qualified immunity is not sufficient to protect them from vexatious litigation. However, none of Respondents' objections to qualified immunity withstand scrutiny.

A. QUALIFIED IMMUNITY HAS WORKED FOR VIRTUALLY ALL GOVERNMENT FUNCTIONS

The short list of functions for which absolute immunity consistently attaches makes it clear that the function must occupy a unique position in government processes:

1. Judges making judicial or legislative decisions, *see Pierson*, 386 U.S. 547; *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 734 (1980);
2. Jurors deciding cases, *see Imbler*, 424 U.S. at 422-23;
3. Prosecutors making indictment and trial strategy decisions, *see id.* at 427;
4. Agency officials acting as judges or prosecutors in administrative hearings, *see Butz*, 438 U.S. 478;
5. Witnesses, *see Briscoe*, 460 U.S. 325;
6. The President, *see Nixon v. Fitzgerald*, 457 U.S. 731 (1982); and
7. Legislators and their aides, the latter only for certain acts, *see Tenney v. Brandhove*, 341 U.S. 367 (1951).

In contrast, even an abbreviated list of functions for which qualified immunity is the rule makes it apparent that the umbrella of qualified immunity provides adequate shelter for almost all government conduct:

1. Judges making employment and administrative decisions, *see Forrester*, 484 U.S. 219;
2. Prosecutors advising police officers, *see Burns*, 111 S. Ct. 1934;

3. Governors, *see Scheuer v. Rhodes*, 416 U.S. 232 (1974);
4. Officers and members of the National Guard, *see id.*;
5. Presidents of state universities, *see id.*;
6. Cabinet members, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985);
7. Police officers doing investigative and enforcement work, *see Malley*, 475 U.S. 335; *Pierson*, 386 U.S. 547;
8. Senior aides to the President, *see Harlow*, 457 U.S. 800;
9. Law enforcement officers presenting probable cause affidavits to the court, *see Malley*, 475 U.S. 335;
10. Lower level federal officials and employees, *see Westfall*, 484 U.S. 292; and
11. School board members, *see Wood v. Strickland*, 420 U.S. 308 (1975).

Respondents' argument that judicial immunity is a vastly different creature from executive and legislative immunity and that comparisons are inappropriate has been soundly rejected by this Court. *Imbler*, 424 U.S. at 420-21. Although each branch of government may raise differing considerations, the general principles underlying immunity are the same. *Id.*; *Butz*, 438 U.S. at 510. Moreover, the branch of government does not dictate the form of immunity. Executive officials can enjoy "judicial" immunity, *see Butz*, 438 U.S. at 512-14, and judicial officials can enjoy legislative immunity, *see Consumers Union*, 446 U.S. at 734. Function, not title, is determinative.

That hundreds of thousands of government officials and employees can perform their official responsibilities with the protection of only qualified immunity suggests court reporters can do the same. Qualified immunity is sufficient to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

B. QUALIFIED IMMUNITY HAS NOT RESULTED IN A FLOOD OF COURT REPORTER LITIGATION

Respondents offer no evidence that qualified immunity for court reporters will open the floodgates of litigation. Qualified immunity is the majority rule – adopted by the Second, Third, Fifth, Sixth, Eighth, and Eleventh Circuits – whereas absolute immunity has been recognized in only the Seventh and Ninth Circuits. *See* Brief of Petitioner at note 30. Yet there is no evidence that court reporters in the qualified immunity circuits are bedeviled by vexatious suits.[11] Statistics for the Second and Eighth Circuits in fact indicate court reporter lawsuits are scarce. *See* Brief of Petitioner at 22-24.[12]

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[11] The National Court Reporters Association, surely in a position to know, fails to cite any source documenting concerns with the volume of litigation in those circuits with qualified immunity.

[12] Respondent Byers & Anderson criticizes Petitioner's statistics for including only appellate data, Byers & Anderson Brief at 17-18; however, the cited statistics include both appellate and district court filings and opinions.

In addition, it defies common sense to suggest that court reporters are as likely as judges, prosecutors, witnesses, and jurors to attract the animosity of disgruntled litigants. Those charged with prosecuting, testifying, and judging face a greater risk of suit because they play key roles in determining guilt or liability. *See Bradley*, 80 U.S. at 348. Court reporters play no such role. Nor is it plausible to assume that every typographical error or inaccuracy in a transcript will lead to a lawsuit. Most such errors are obvious to the reader, are harmless, and cause no alteration in the substance of what is being transcribed. Furthermore, the parties have the option of having the transcript corrected. Court reporters thus are likely to attract the ire of litigants not for the way in which they transcribe but only for their refusal or absolute failure to transcribe.[13]

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[13] Respondents argue that depriving court reporters of absolute immunity will cause a substantial increase in the amount of litigation against not only reporters but also other auxiliary court personnel, such as clerks. However, as discussed above in section I.A, any decision from this Court about court reporter immunity cannot be extrapolated to other court personnel performing other functions. What may be true for the court reporter may not hold true for the clerk, and vice versa. Moreover, clerks had no absolute immunity at common law, *see Bates v. Foree*, 67 Ky. (4 Bush) 430 (1868).

Respondents cite *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1988), to argue that absolute immunity is necessary for court personnel generally. In *Foster*, a bench warrant was mistakenly issued for a motorist who had previously paid his fine, and the motorist sued the clerk. Qualified immunity would have provided sufficient protection; presumably the clerk issued the warrant based on information available at the time and consequently violated no "clearly established . . . rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Simple

C. QUALIFIED IMMUNITY ALLOWS FOR EARLY DISMISSAL OF INSUBSTANTIAL CLAIMS

Respondents also offer no basis for concluding that qualified immunity is unworkable or that most cases against court reporters will contain triable issues. Again and again, the Court has articulated the advantages of its qualified immunity standard, first formulated in *Harlow v. Fitzgerald*, which permits early dismissal of baseless claims. *Malley*, 475 U.S. at 341. *See Wyatt v. Cole*, 112 S. Ct. 1827 (1992) (Kennedy, J. & Scalia, J., concurring); *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991); *Anderson v. Creighton*, 483 U.S. 635 (1987). That standard focuses on whether the official reasonably could have believed that his or her conduct was lawful.

Respondents' complaint that qualified immunity will not protect court reporters from lawsuits over minor delays in transcript production thus is without merit. Reporters may apply to the court for extensions of time or seek the parties' consent to delays; when court approval or consent is granted, court reporters should have every reason to believe their conduct is lawful.[14]

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affidavits describing the computer error or other innocent clerical mistake would suffice for early dismissal of such a lawsuit on motion.

Nor is there any question that the judge issuing the show cause order that led to the warrant in *Foster* is absolutely immune. *Stump v. Sparkman*, 435 U.S. 349 (1978).

[14] Fed. R. App. P. 10(b) provides a simple mechanism of relief for court reporters who cannot meet deadlines – they may request an extension. And, as this case makes crystal clear, even court orders and sanctions may be inadequate. Surely judicial efficiency is better served by a rule requiring court reporters to request extensions rather than a rule whereby the aggrieved party's only remedy is litigating the issue through an appeal.

Attorneys and litigants have always worked within such time constraints.

D. ABSENT SUITS FOR DAMAGES, VICTIMS OF CONSTITUTIONAL VIOLATIONS BY COURT REPORTERS HAVE NO ALTERNATIVE REMEDIES FOR COMPENSATION

The existence of alternative remedies has never been determinative of absolute immunity.[15] For Petitioner, there has been no remedy. His action against Respondents is his only avenue of "compensation [for] past abuses." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).[16]

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[15] In some cases, the Court has applied absolute immunity in the absence of alternative remedies. *E.g., Dennis*, 449 U.S. 24 (plaintiff had no remedy other than damages for alleged battery); *Stump*, 435 U.S. 349 (plaintiff had no remedy other than damages against judge who issued sterilization order). In other cases, the Court has denied absolute immunity although alternative remedies are available. Thus, police officers receive only qualified immunity for Fourth Amendment violations, despite the alternative remedy of suppression of evidence. *See Pierson*, 386 U.S. at 547. *See also Burns*, 111 S. Ct. 1934 (prosecutor denied absolute immunity for advice to police despite remedy of suppression of confession).

[16] "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen*, 445 U.S. at 651. The Court's longstanding reluctance to extend absolute immunity beyond functions that require special protection arises from its recognition of the importance of a damages remedy to protecting con-

The availability of a reconstructed transcript, for example, does not compensate for all damages caused by derailed appeals.[17] And, in criminal proceedings, courts are extremely reluctant to reverse convictions because of an incomplete transcript or the delay in its production. *See, e.g., United States v. Antoine*, 906 F.2d 1379 (9th Cir.), *cert. denied*, 111 S. Ct. 398 (1990).[18] In the civil context,

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stitutional rights. *Harlow*, 457 U.S. at 807; *Butz*, 438 U.S. at 504-06.

[17] Nothing suggests that Fed. R. App. P. 10(c), which provides for reconstructed transcripts, was directed at either deterring court reporter misconduct or serving as an alternative remedy to damages. Prior to adoption of the Federal Rules of Appellate Procedure, Rule 10(c) was contained in Rule 75(n) of the Federal Rules of Civil Procedure. Rule 75(n) was intended to provide "a method whereby a record may be prepared in the perhaps rare case where there is no reporter present at all and no stenographic report is made of the proceedings" and to be "helpful as supplemental safeguards to prevent injustice in unusual cases." REPORT OF THE ADVISORY COMMITTEE, 5 F.R.D. 433, 490 (1946).

[18] Respondents also raise a *res judicata* argument, contending that Petitioner's claim of constitutional violations has already been rejected by the Ninth Circuit, precluding his raising it through a *Bivens* action. However, Respondents' *res judicata* argument was not raised in the courts below and is not before this Court now.

In any event, Respondents wrongly assume that Petitioner's claims in his civil suit are identical to the claims raised in the criminal proceeding. The Ninth Circuit's due process rulings were limited to issues of prejudice in his conviction; constitutional violations relating to, as one example, equal protection in access to the courts, *see Griffin v. Illinois*, 351 U.S. 12 (1956), for injuries unrelated to conviction and confinement, were not addressed. Nor did the courts below address Petitioner's nonconstitutional claims, which are based in part on

courts are reluctant even to remand for a new trial. *See Bergerco, U.S.A. v. Shipping Corp. of India. Ltd.*, 896 F.2d 1210, 1216 (9th Cir. 1990).[19]

III. HISTORY DOES NOT SUPPORT ABSOLUTE IMMUNITY

Contrary to Respondents' assertions, court reporters are not performing a task historically performed by judges. Judges have never been charged with producing verbatim transcripts, and judge note-taking had the same purpose at early common law it has today: aiding the judge's recollection. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 5, 18 (1983). The preparation of the record is, and historically has been, primarily the responsibility of the parties. *See* Fed. R. App. P. 10, 11. Consequently, court reporters cannot rely on history as a basis for according them absolute immunity now. *See Burns*, 111 S. Ct. at 1945-46 (Scalia, J., concurring in part and dissenting in part).

In refusing to recognize absolute immunity for no lesser a person than the Attorney General of the United States, this Court stated: "We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established

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Ms. Ruggenberg's failure to return a $700 payment by Petitioner despite his indigent status.

[19] To Petitioner's knowledge, only one federal appellate court has remanded a civil case under Fed. R. App. P. 10(c) based on the lack, or delay in production, of a transcript. *See Bergerco*, 896 F.2d at 1217.

law." *Mitchell*, 472 U.S. at 524 (plurality opinion). Likewise, Petitioner does not believe that the judicial process in this country will be threatened if court reporters are given incentives to abide by clearly established law.

IV. CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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